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In the

Supreme Court of the United States

No. 592

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

BRIEF AND APPENDIX IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents desire briefly to set forth some of the reasons why petition for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in this cause on August 12, 1963, should not be granted.

OPINIONS BELOW

At the time the petition for writ of certiorari was filed, the opinion of the Court of Appeals had not been reported.

Since that time it has been reported and is found in 322 F. 2d 332.

JURISDICTION

We do not question the fact that this Court has the jurisdiction. We do say, and that without regard to what we hereafter point out in this reply, that the jurisdiction should not be exercised in a case such as this where the Court of Appeals has not passed upon any of the ultimate substantive issues, but has remanded the case to the District Court for a consideration by it of the substantive issues after the controlling questions of state law have been decided by the Supreme Court of Appeals of Virginia. Those controlling questions of state law were submitted to the Circuit Court of the City of Richmond in the case of *School Board of Prince Edward County* v. *Griffin, et al.*, and the opinion of that court was handed down on March 21, 1963. That opinion is not reported. In order that this Court may have full knowledge of the issues of state law involved, we print that opinion as Appendix A to this brief.

Appeal was duly taken to the Supreme Court of Appeals of Virginia which granted the appeal in June of 1963. Because of the importance of the case, the Court advanced it on the docket and set it for argument at the October, 1963, session. The case was argued October 8, 1963. It is the general practice of the Supreme Court of Appeals of Virginia to decide cases argued at one session on the second Monday of the succeeding session. The succeeding session of the Supreme Court of Appeals will convene on November 25, 1963, and its opinion day will be December 2, 1963. On very rare occasions a case is not decided at the succeeding session, but may be carried over to the session thereafter.

Should that happen in this case, the decision of the Supreme Court of Appeals may be expected in January of 1964.

We submit that this Court should not deal with a decree in a case which is in the situation that here exists; namely, where the United States Court of Appeals has decided none of the substantive issues, but has held that decision thereon should await the determination of questions of state law and where those questions of state law have not only been submitted but have been argued before the highest appellate court of the state from which an almost momentary decision is awaited.

QUESTIONS PRESENTED

The petition for writ of certiorari enumerates four questions which petitioners state are presented.

The first question is whether under the circumstances of this case the doctrine of federal abstention should be applied. In their "Reasons for the Allowance of the Writ" petitioners discuss and seek to support their view of this question.

No reason for the allowance of the writ in relation to the second and fourth questions is set forth in the petition.

The third question which the petitioners say is presented is that related to the constitutionality of state tuition grants to parents in aid of the education of their children at private nonsectarian schools or at public schools outside of the locality in which the parents reside. That question is not involved in this case as is very clearly stated by the Court of Appeals in its opinion as follows:

> "As indicated above, Virginia's tuition grants had a considerable history. That program has not been attacked in this case. Its constitutionality has not been questioned." 322 F. 2d 332, at p. 339.

STATEMENT

Beginning on page 3 of the petition and under the title of "Statement," the petitioners give their conception of an accurate factual statement which is supplemented by them in various places in the latter portion of the petition. While there is much in that "Statement" that cannot be sustained from the record, it is not necessary in this brief in opposition to go into any extended correction because our contention can be predicated as well upon the erroneous statements of petitioners as it can be upon an accurate statement. We are impelled, however, to call attention to several things in this "Statement."

In the paragraph beginning at the bottom of page 7 of the petition it is said that the present tuition grant program of Virginia has its genesis in the "massive resistance" legislation of 1956. This is incorrect. Long before the term "massive resistance" was conceived, Virginia had an extensive tuition grant program applicable to many situations.*

It is then said that the "massive resistance" legislation provided "for the channeling of public school funds into private schools," and the inference to be drawn from the remainder of the paragraph is that the present tuition grants are payable out of funds which would otherwise go to the support of public schools. A cursory examination of Virginia's financial legislation proves such an inference to be totally unwarranted. For instance, all appropriations in aid

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* For history of tuition grants to war orphans beginning with Acts of Assembly 1930, p. 810. See *Almond* v. *Day*, 197 Va. 419, 89 S. E. 2d 851 (1955); for tuition grants in other instances see Acts, 1936, p. 561 (§ 23-10, Code of Virginia (1950)); for provision that one school district authorized to pay tuition of pupil attending school in another school district, see § 719, Code of Virginia (1919); for Act under which payment of vocational rehabilitation expenses of disabled persons is authorized, see Acts of Assembly 1922, p. 901.

of public schools made by the General Assembly of Virginia for the biennium beginning July 1, 1960, are found in Items 355 through 389, inclusive, of the Appropriation Act of 1960 (Acts of Assembly 1960, pp. 995, *et seq.*) The appropriation out of which state tuition grants are paid is not found in any of those items. There is an entirely different and separate appropriation to the Governor for the sole purpose of paying these tuition grants which is found in Items 505 and 506 of that Appropriation Act (p. 1021). In like manner in the Appropriation Act of 1962 for the biennium beginning July 1, 1962, all funds in aid of public schools are to be found in Items 392 through 436, inclusive, of the Appropriation Act of 1962 (Acts of Assembly 1962, pp. 1334, *et seq.*). None of those funds is available for the payment of tuition grants. Money for tuition grants is provided in an appropriation to the Governor for that purpose and is Item 548 of that Appropriation Act (p. 1360).

Great complaint is made by petitioners of what they assert to have been delays in this litigation. The only purpose of these statements is to gain an unwarranted sympathy from the Court. It is not charged that any of these defendants has been guilty of any delay. The truth of the matter is that these very petitioners waited from the spring of 1959, when the Court of Appeals handed down its opinion ordering that desegregation of the public schools should commence in September of 1959, until April 22, 1960, before they saw fit to present to the District Court an order carrying out that opinion and mandate of the Court of Appeals. Furthermore, while these petitioners did file a motion for leave to file a supplemental complaint in June of 1960, they aggrieviously misquote the record when they state that the supplemental complaint was amended in September, 1960. They did not even move to amend that supplemental com-

plaint until January of 1961, and it was amended in April of 1961.

In September of 1961, petitioners filed in the Supreme Court of Appeals of Virginia a mandamus suit under the style of *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S. E. 2d 227 (1962), seeking to compel the Board of Supervisors of the County to levy taxes and appropriate funds for public schools within the County. They submitted in their petition to that Court questions of both state and federal law; and upon the pleadings being presented to the United States District Judge, he found in his order of November 16, 1961, that they had submitted the questions which he in his opinion of August 23, 1961 (*Allen* v. *County School Board*, 198 F. Supp. 497 (E.D. Va. 1961)) had held needed to be decided by the State Supreme Court. That having been done, they then proceeded to file a brief before the Supreme Court of Appeals of Virginia in which they denied that they were submitting any questions of federal law. It was for that reason that the Court of Appeals for the Fourth Circuit in its opinion of August 12, 1963, stated:

> "The plaintiffs applied to The Supreme Court of Appeals of Virginia for a writ of mandamus to compel the Board of Supervisors to levy taxes and appropriate funds for the operation of public schools. The District Judge saw copies of the pleadings and, apparently, was of the opinion they put in issue all relevant questions. In their printed brief, however, the plaintiffs disclaimed the presence of any federal question, with the result that the court decided only one narrow issue. * * *" 322 F. 2d 332, at p. 334, footnote 3.

We do not believe that there has been any unnecessary delay in this case; but, if there has been, it is the petitioners

who brought it about. That statement is borne out by the fact that petitioners do not charge respondents with having brought about any delay, and it is safe to assume that if a vestige of a ground existed upon which to support such a charge, it would have been made.

Finally, we call attention to what is not only a highly improper statement but a totally erroneous one. On page 23 of the petition, it is stated:

> "Thanks to the Government of the United States, formal, standardized education has been provided Negro children in the county since September, 1963, under private auspices."

The truth is the following: As early as January of 1960 the white citizens of Prince Edward County organized a corporation for the purpose of operating private schools for the Negro children in exactly the same way that education was being made available to their own children. Had the Negro citizens desired in 1960 to cooperate with this move to furnish education through private sources to their children, those children would not have been without educational advantages during these years—but, for whatever the reason, such was not to be.

This record further shows that when the Virginia Teachers Association (an association of the Negro public school teachers in Virginia) announced it would conduct a crash educational program for Negro children in the summer of 1961, the School Board of the County immediately offered the public school buildings of the County, together with utilities and janitorial services, for use in that program, all at no expense. That offer was rejected, and as shown by this record, that crash program was carried on with makeshift facilities in county churches and stores.

The only connection that the "Government of the United States" has had with the present private schools being operated in Prince Edward County for Negroes is that an Assistant Attorney General of the United States, i.e., William vanden Heuvel, acted as a catalyst in bringing together various interests and induced the Negro people of the County to avail themselves of private educational facilities. He has paid public tribute in an address recently delivered by him at Hampden-Sydney College to the cooperation and desire of the authorities and white citizens of Prince Edward County to assist in giving to the Negro children educational advantages (Richmond Times-Dispatch, October 18, 1963). Not a member of the Board of Directors of that private school is connected with the Federal Government. They are all Virginians engaged in educational work in Virginia save the Chairman of the Board who is Ex-Governor Colgate W. Darden, former President of the University of Virginia. Those schools are being conducted and operated in buildings owned by the School Board of Prince Edward County which have been made available for use by this private corporation together with school buses and other equipment. The lease provides for a rent which simply meets the expenses to which the School Board of Prince Edward County is put in connection with the buildings being used. That rent does not provide for any return on capital investment and does not include one penny of profit. As a matter of fact, well over a million and a quarter dollars of properties are being rented for an annual consideration slightly in excess of thirty thousand dollars. And, out of that rental the School Board of Prince Edward County and not the trustees of the private school system furnishes all repairs and janitorial services. So far as the attorneys representing the respondents in this case are advised, and the attorneys for the School Board and

the Board of Supervisors have been very close to the situation, there has been not one cent of money contributed to this cause by the Federal Government or any department thereof.

But for the actions of the Governor of Virginia in persuading the individuals who are the Directors of the corporation to give of their time and ability to this cause, but for the willingness of those Virginians so to do, and but for the cooperation given by the School Board of Prince Edward County in making available buildings, equipment and transportation facilities, these schools would have been an impossibility because the trustees operating them did not agree to serve and did not begin any work on the project until late in August of this year, and those schools were begun on September 16 of this year.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Under the heading "Reasons for the Allowance of the Writ" the petitioners assign one reason. They say:

> "Application of the doctrine of federal abstention in this cause is misplaced and in direct conflict with principles established in the decisions of this Court."

After citing a number of decisions of this Court, they then set forth in the first paragraph beginning on page 13 of their petition their conception of the doctrine of federal abstention. With their statement, so far as it goes, we have no complaint. But their statement of that doctrine is not complete. Federal courts should abstain not only as stated by them "where the strands of local law are so inmeshed in the issues pending before the federal court, and an authoritative interpretation of the local law questions may make

unnecessary consideration of the federal claims presented," but the federal courts also should abstain when an essential part of the question to be decided is the meaning and interpretation of state law. When such is the case, the opportunity should be given to the state court to decide that question of state law so that the federal court may be certain of the facts to which it is applying federal law. The very cases cited by the petitioners in support of their narrow conception of the doctrine of federal abstention support this full and true statement of that doctrine.

On page 14 of their petition, the petitioners set forth four federal claims which they say are raised in this case. They then add:

> "These are all federal issues which must be determined in this cause and which cannot be settled with any finality in the state courts."

The question is not whether the issues can be settled with finality in the state courts. Rather, the question is whether or not authoritative interpretation of state Constitution and statute is needed before the true issue, if any, under the federal law may be stated.

There cannot be the slightest doubt that the case asserted by petitioners fundamentally rests upon the interpretation which petitioners place upon the Constitution and statutes of Virginia. A reading of their amended supplemental complaint filed in April of 1961 is sufficient to demonstrate the accuracy of that statement.

Yet, petitioners contend that the questions truly involved in this case may be decided by the federal court without determining a number of questions of state law—the most fundamental of which is whether the State of Virginia maintains, operates and supervises the public schools in the

state or whether each locality maintains, operates and supervises its own schools. This contention is belied by the petition itself—the above question is so fundamental to this whole case that the petitioners cannot even summarize their reasons why the writ should be granted without setting forth and relying upon their interpretation of the state law. The last full sentence in the main text on page 17 of the petition reads:

> "Here, the state is fully involved in the educational process and in the maintenance, operation, and supervision of public schools now operating throughout the state."

There is a footnote to that sentence in which many sections of the Virginia Code are cited, and the main text of the petition proceeds further to elaborate upon petitioners' view that the maintenance, operation and supervision of public schools in the State of Virginia is fundamentally a state matter. One of the great issues in this case, and indeed the federal aspects of this case cannot be approached or dealt with if that issue is to be ignored, is whether the public schools operated in Virginia are established, maintained and operated by the State of Virginia or by the localities. The Court of Appeals for the Fourth Circuit stated it thus:

> "The question here, however, is whether Virginia's school laws establish an arrangement within the local option principle the defendants advance. If Section 129 of Virginia's Constitution imposes upon the General Assembly the duty to provide operating, free, public schools in every county, as the United States contends, its election to establish a system having features of a local option arrangement may be permissible under state law only so long as schools are operated in every county.

> On the other hand, if Section 129 of Virginia's Constitution, construed in the light of other constitutional provisions, requires of the General Assembly only that it provide for a system of education under which counties and cities are authorized to establish and maintain schools of their own with state assistance, then the principle which the defendants assert may be applicable. The answer is unclear. It requires interpretation and harmonization of Virginia's Constitution and statutes.
>
> "The question is unresolved. Virginia's Supreme Court of Appeals has considered her school laws in a number of cases, but none of them settle the question here." *322* F. 2d, *332*, at p. *342*.

The whole case of petitioners is predicated upon an assertion of state operation, first made in their amended supplemental complaint and from then on at every stage in this proceeding. A fundamental position of the respondents from the inception has been that under the Constitution and laws of Virginia, as they now stand and for many years have stood, the establishment, maintenance and operation of the public schools is a local matter. No opinion deciding with finality the issues presented can be rendered without there first being a determination of the primary question which is not only "immeshed in" but irrevocably woven as a part of this case and that question is one of state law on which only a state court can speak with finality:

> "Are the public schools of Virginia established, maintained and operated by the State or by the several localities?"

Any attempt to determine the federal issues without first deciding that question must ultimately prove to be an exercise in futility.

We do not question petitioners' statement that this is a

case of great public importance. We at the present time are inclined to the view that ultimately the decision on substantive questions in this case should be reviewed by the Supreme Court of the United States. But that review ought to come at the proper time and under the proper conditions. It should come only after the lower federal tribunals, both District Court and Court of Appeals, have intelligently dealt with the substantive issues in the light of an authoritative decision of the meaning of state Constitution and statutes. Questions as important as those here raised should not be dealt with by this Court until they have first been decided by the courts below. Then, and only then, will this Court be placed in true appellate position where it can review the actions of the courts below rather than in the position of deciding the matter in the first instance.

CONCLUSION

Rule 19 of the Revised Rules of the Supreme Court of the United States on its face neither controls the Court nor measures the Court's discretion upon the question whether it will grant a writ of certiorari. But, the attention of the Court should be called to the fact that none of the character of reasons which the Court sets forth in that Rule as indicative of those that will be considered is here present. Here the Court of Appeals for the Fourth Circuit has not rendered a decision in conflict with the decision of another court of appeals on the same matter; certainly it has decided no question of state law in a way in conflict with the state law or otherwise; it has decided no important question of federal law which has not been settled by this Court; it has decided no question of federal law in a way which conflicts with any applicable decision of this Court; and it has not departed from the accepted or usual course of judicial proceedings.

As said above, when the substantive questions have been decided by lower tribunals in the light of state Constitution and statute, then it may well be that the matters are of such importance that this Court should review. But until that time has arrived, this Court should deny the petition for the writ.

Respectfully submitted.

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